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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1658.

CHARLES M. PARKER AND EMMA PARKER, APPELLANTS,

vs.

LUCINDA L. ORMSBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA.

FILED MARCH 17, 1891.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of May, 1890.

Be it remembered that on the 13th day of December, 1889, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

LUCINDA L. ORMSBY, Complainant,
vs.
CHARLES M. PARKER, EMMA PARKER, and MARTHA I. COURTNEY, Respondents.
} In Chancery.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Lucinda L. Ormsby, residing at Chicago, Cook county, Illinois, and a citizen of the State of Illinois, brings this her bill against Charles M. Parker, Emma Parker, and Martha I. Courtney, *and* citizens of the State of Nebraska; and thereupon your orator complains and says that the plaintiff and defendant- above named are residents and citizens of the several places hereinbefore mentioned, and that the matter in controversy in this suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

Further, your orator avers that heretofore, to wit, on the seventh day of September, 1886, said Charles M. Parker, for a valuable consideration, made, executed, and delivered unto Walter J. Lamb his certain promissory note, in writing, of the date last aforesaid, whereby he undertook and promised to pay unto Walter J. Lamb or order certain sums of money as follows, to wit:

Two thousand dollars the 7th day of September, A. D. 1891,
2 with interest thereon at the rate of eight per cent. per
annum, payable semi-annually, according to the tenor and effect of ten coupons of 80 dollars each attached to said note, and said note stipulated that said coupons should bear interest at the rate of eight per cent. per annum if not paid when due, as will more fully appear by the said note and coupons, ready to be produced in court.

Further, your orator represents and shows unto your honors that your orator is the legal owner and holder of said note and the mortgage, hereinafter described, given to secure the payment of said note, and that no proceedings have been had at law for the recovery of the said mortgage debt or any part thereof, and that no part of said debt has been paid except interest to March 7th, A. D. 1888, and that all the taxes assessed against said premises for the year A. D. 1888 have become delinquent and are unpaid, except the sum of nine dollars paid by this complainant, and there still remains due and payable on said indebtedness the sum of two thousand & nine dollars, with 8 per cent. interest from the 7th day of March, A. D. 1888, according to the tenor of said coupons, & interest at 8 per cent. on $80 from Sept. 7th, 1888, and on $80 from March 7th, 1889.

Further, your orator represents and shows unto your honors that on the 7th day of September, 1886, the said Chas. M. Parker & Emma Parker, for the purpose of securing the payment of said moneys in said note mentioned when the same should become due and payable, made, executed, and delivered unto Walter J. Lamb a certain mortgage deed, whereby the said Charles M. Parker and Emma Parker did grant, bargain, sell, and convey unto the said Walter J. Lamb the following-described real estate, situate in the county of Lancaster and State of Nebraska, to wit, the west half of lot two (2) and all of lot three (3), in block No. ten (10), in Lavender's Addition to Lincoln, Nebraska, more particularly described as follows: Beginning on the south side of L street 75 feet west of the northeast
3 corner of said block ten, in Lavender's Addition, running thence west along L street 75 feet; thence south, parallel with 18th street, 142 feet to the alley running east and west; thence east, parallel with L street, 75 feet; thence north, parallel with 18th street, 142 feet to the place of beginning, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

Your orator further shows that the said Charles M. Parker and Emma Parker did by said deed covenant with the said Walter J. Lamb that they — lawfully seized of said premises; that they were free from incumbrance, and did also covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Said mortgage deed was to be void, however, if the said Charles M. Parker whould well and truly pay the said sums of money in said note mentioned, with interest thereon, according to the tenor and effect of said note, and should duly keep and perform all the other covenants and agreements in said mortgage contained.

Further, your orator represents and shows unto your honors that it was expressly stipulated and agreed in said mortgage that the whole of said sum of money in said note mentioned and the interest thereon should immediately become due and payable in any of the following events—that is to say, if said sum of money or any part thereof or any interest thereon be not paid when the same is due, if the taxes and assessments against said premises be not paid at or before the time the same by law become delinquent, or if said mortgagors fail to keep and perform any of the covenants contained in said mortgage on their part to be kept and performed; yet the said defendant failed and neglected to pay the taxes on any of said
4 premises for the year 1888 before the same become delinquent, and this complainant paid of the same the sum of nine dollars on the west half of lot (2) two herein described; that it was stipulated by said mortgage that if the said mortgagors failed to pay the taxes on the said premises before the same became delinquent that the mortgagee or his assigns might pay the same, which sum

so paid, with ten per cent. interest, should be a lien on said premises like said principal sum.

Further, your orator represents and shows unto your honors that it was expressly agreed and provided in said mortgage that in case of default in any of the payments therein provided the said whole sum should become immediately due.

Your orator further represents and shows unto your honors that the said Charles M. Parker did in said note and mortgage stipulate and agree that in the event of the non-payment of the said note or foreclosure of said mortgage there should be awarded, in addition to the judgment, as an attorney's fee, — equal to ten per cent. of the amount due thereon.

Further, your orator represents unto your honors that the said mortgage was, on the seventh day of September, 1886, at the hour of 3.10 o'clock in the afternoon of said day, duly filed for record in the office of the county clerk of said Lancaster county, in said State of Nebraska, and was there recorded in Book 12 of Mortgages, at page 604.

Further, your orator represents and shows unto your honors that the defendant Martha I. Courtney claims to have some estate or interest in said mortgage premises or some part thereof as purchaser, mortgagee, lessee, judgment creditor, or otherwise, but said estate or interest, if any, is subject and subsequent to the lien of your orator's mortgage, and, as your orator is informed and believes, is more particularly described as follows, though your orator cannot state
5 the exact nature thereof: By virtue of judgment lien against one Luke Lavender, a former owner of the said property.

But no personal claim is made against any of the defendants herein except the said Charles M. Parker, who is personally liable for said indebtedness.

Your orator therefore prays the aid of the court in the premises that said defendants may appear and answer this your orator's bill (but without oath, answer on oath being expressly waived).

That an account may be taken of the amount due your orator on said note and mortgage.

That the defendants or some of them be ordered and decreed to pay to your orator what shall be found to be due her thereon, with interest and costs of suit and ten per cent of the sum found to be due as attorney's fee, by a day to be appointed by the court.

And in default thereof that said defendants and all persons claiming through or under them or either of them be forever barred and foreclosed of and from all right and equity of redemption in and to said mortgage premises and every part thereof.

And that said mortgage premises be sold under the order and decree of this court, and the moneys arising from such sale applied to the payment of the amount found due your orator, with costs and attorney's fee.

That the defendants personally liable be decreed to pay to your orator any deficiency there may be of said mortgage debt, and that execution be awarded therefor.

That the purchaser at such sale be placed in possession of said mortgage premises.

That your orator may have such other and further relief as shall be agreeable to equity and good conscience.

6 And so may it please your honors to grant unto your orator the most gracious writ of subpœna, to be issued under the seal of this court, directed to Charles M. Parker, Emma Parker, Martha I. Courtney, therein and thereby commanding them, on a certain day and under a certain penalty therein to be limited, personally to be and appear before this court, then and there to answer all and singular the premises, and to stand and to abide and to perform such order and decree therein as to the court shall seem meet.

WALTER J. LAMB,
Solicitor for Plaintiff.
A. C. RICKETTS,
Of Counsel.

Upon the back of said bill appear endorsements in words and figures following, to wit:

No. 250, N. Bill. United States circuit court, district of Nebraska. In chancery. Lucinda L. Ormsby *vs.* Charles M. Parker and others. Filed Dec. 13, 1889. Elmer D. Frank, clerk. I hereby enter myself security for all costs that may accure in above-entitled cause. Walter J. Lamb, sec't'y. Approved. E. D. Frank, clerk. Walter J. Lamb, solicitor for plaintiff; residence, Lincoln, Nebraska.

Thereupon, afterwards, to wit, on the said 13th day of December, 1889, subpœna in chancery was duly issued in said case and returned and filed December 17th, 1889; which said subpœna is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to Charles M. Parker, Emma Parker, and Martha I. Courtney, Greeting:

7 We command you and each of you that you appear before the judges of the circuit court of the United States for the district of Nebraska, at Omaha, on the first Monday in January next, it being the 6th day of January, A. D. 1890, to answer to the bill of complaint of Lucinda L. Ormsby this day filed in the office of the clerk of said court, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 13th day of December, A. D. 1889, and of the Independence the 114th year.

[SEAL.] ELMER D. FRANK, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Omaha aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed and a decree entered thereon accordingly.

ELMER D. FRANK, *Clerk.*

Attached to said subpœna is the return of the marshal in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 13th day of December, 1889, I received this subpœna in chancery, and on the 16th day of December, 1889, I served the same on the within defendants, Charles M. Parker and Martha I. Courtney, in Lancaster county, State and District of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of abode of each of the said defendants, with an adult person and resident in the
8 family of each of said defendants.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By D. H. MERCER,
Deputy United States Marshal.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 13th day of December, 1889, I received this sub. in chan. and on the 16th day of December, 1889, I served the same on the within-named Emma Parker, in Lancaster county, State and district of Nebraska, by delivering to and leaving with her a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By D. H. MERCER,
Deputy United States Marshal.

Upon the back of said subpœna appear endorsements in words and figures following, to wit:

No. 250, doc. N. Circuit court of the United States for the district of Nebraska. In chancery. Lucinda L. Ormsby *vs.* Charles M. Parker *et al.* Subpœna in chancery. Returnable to rule day, first Monday in January, 1890. Elmer D. Frank, clerk. Returned and filed Dec. 17, 1889. Elmer D. Frank, clerk. Walter J. Lamb, comp't's sol.

Marshal's costs:

3 copies	90
R. R. fare	3 30
Subsistance	1 00
Service	6 00
Use of team	1 00
Total	**$12 20**

Thereupon, afterwards, to wit, on the 4th day of January, 1890, motion of Martha I. Courtney to dismiss as to her was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

Lucilda L. Ormsby
vs.
9 Charles M. Parker, Emma Parker, & Martha I. Courtney. } Motion.

Comes now the defendant Martha I. Courtney and moves the court to dismiss this suit in chancery so far as relates to the defendant Martha I. Courtney for the following reasons, to wit:

First. Martha I. Courtney is not a proper defendant in this suit.

Second. An action over the interest of Martha I. Courtney in the property in controversy, to wit, lot 3, in block —, in Lavender's Addition to the city of Lincoln, Nebraska, is now pending in the supreme court of the State of Nebraska, entitled Charles M. Parker against Martha I. Courtney, which suit was decided in the district court of said Lancaster county, Nebraska, long prior to the commencement of this suit in U. S. circuit court.

Third. Because a suit in ejectment & to quiet the title to the property in question is now pending in the district court of Lancaster county, Nebraska, in which Martha I. Courtney is plaintiff and Cooper B. Parker & Elmira Parker, the grantors of Charles M. Parker, are defendants, and said suit was pending in said court at the time said mortgage was given to Lucinda L. Ormsby, and for several years prior to the execution of said mortgage the case had been twice to the supreme court of Nebraska, and this plaintiff well knew of the pendency of said suits.

O. P. MASON,
D. G. COURTNEY,
Att'ys for Def't Courtney.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 250, N. Lucinda L. Ormsby *vs.* Charles M. Parker *et al.* Motion of Martha I. Courtney to dismiss as to her. Filed Jan. 4, 1890. Elmer D. Frank, clerk. O. P. Mason, D. G. Courtney, for Courtney.

10 Thereupon, afterwards, to wit, on the 6th day of January, 1890, affidavit of D. G. Courtney was filed in said case; which said affidavit is in words and figures following, to wit:

Affidavit of D. G. Courtney.

In the United States Circuit Court, District of Nebraska.

LUCINDA L. ORMSBY
vs.
CHARLES M. PARKER, EMMA PARKER, & MARTHA I. COURTNEY.

STATE OF NEBRASKA, *Douglas County*, } *ss:*

D. G. Courtney, duly sworn, on oath says that the suit of Martha I. Courtney *vs.* Cooper B. Parker and Almira Parker for the quieting of the title of lot 3, in block 10, Lavender's Addition to the city of Lincoln, is now pending in the district court of Lancaster county, Nebraska, and that same has been pending there since the year 1880 or 1881, and *and* the same has been to the supreme court of Nebraska twice on error and reversed and is now pending in said district court for trial; that about one year ago Charles M. Parker commenced a suit in the district court of Lancaster county, Nebraska, against Martha I. Courtney, asking to quiet the title to lot 3, block 10, Lavender's Addition to the city of Lincoln, Lancaster county, Nebraska; that this property is the same property in dispute in the suit pending in the U. S. circuit court of the district of Nebraska, entitled Lucinda L. Ormsby against Charles M. Parker and Emma Parker and Martha I. Courtney. Affiant says that Charles M. Parker is a brother and the grantee of Cooper B. Parker, or rather the grantee of the Lancaster County Bank, and that the transfers to the Lancaster County Bank & to Charles M. Parker and the mortgage of Charles & Emma Parker were made during the pendency of the said suit of Courtney *vs.* Cooper B. Parker,
11 in the district court of Lancaster county, Nebraska, and affiant
says that the suit of Charles M. Parker *vs.* Martha I. Courtney is now pending in the supreme court of the State of Nebraska on appeal; all of which suits were a matter of record in the courts of Nebraska & Lancaster county, and that the said Lucinda L. Ormsby had notice of the pending of said suit at the time of taking said mortgage & the bringing of this suit in the U. S. circuit court; and further affiant saith not.

D. G. COURTNEY.

Subscribed in my presence and sworn to before me this 6th day of January, 1890.

ELMER D. FRANK, *Clerk.*

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 250, N. U. S. circuit court, district of Nebraska. Lucinda L. Ormsby *vs.* Charles M. Parker, Emma Parker, *et al.* Affidavit of D. G. Courtney. Filed Jan. 6, 1890. Elmer D. Frank, clerk. D. G. Courtney, att'y for def't Courtney.

Thereupon, afterwards, to wit, at the January term of said court, on the 21st day of January, 1890, the following proceedings were had and done in said cause, as appears of record on folio 108, Journal "O," of said court, to wit:

LUCINDA L. ORMSBY
vs. } 250, N.
CHARLES M. PARKER *et al.*

This cause came on this day to be heard on the motion of defendants, by Maul, Mason and Courtney, their solicitors, to dismiss the same as to Martha I. Courtney, was argued, and submitted to the court by solicitors for the respective parties; and the court, being sufficiently advised in the premises, overrules the said motion, and leave is granted the said Martha I. Courtney to file answer herein.

Thereupon, aftarwards, to wit, *on* the said January term of said court, on the 21st day of January, 1890, the following proceedings were had and done in said cause, as appears of record on folio 112, Journal "O," of said court, to wit: 12

LUCINDA L. ORMSBY
vs. } Default.
CHARLES M. PARKER *et al.*

On filing due proof of service of the subpœna issued in this cause on Emma Parker and Charles M. Parker, the defendants herein, twenty days before the return day thereof, and said defendants having failed to appear within the time limited and prescribed by the rules and practice of this court, on motion of W. J. Lamb, solicitor for the complainant, it is ordered that the bill of complaint filed in this cause be, and the same is hereby, taken as confessed by said defendants.

Thereupon, afterwards, to wit, at the said January term of said court, on the 1st day of February, 1890, the following proceedings were had and done in said cause, as appears of record on folio 228, Journal "O," of said court, to wit:

LUCINDA L. ORMSBY
vs. } 250, N.
C. M. PARKER *et al.*

On motion of the defendants, leave is granted by the court to answer herein by Feb. 10th, and the complainant in open court thereupon waives verification to said answer, and complainant is ruled to reply in fifteen days.

Thereupon, afterwards, to wit, on the 1st day of February, 1890, motion and affidavit of Chas. M. Parker was filed in said case; which said motion & affidavit *is* in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

13 LUCINDA ORMSBY, Pl'ff, *vs.* CHARLES M. PARKER, EMMA PARKER, & MARTHA I. COURTNEY, Defendants. } Motion.

Motion.

Comes now the defendants Charles M. Parker and Emma Parker and submits that this honorable court has no jurisdiction of the subject-matter of this suit, for the reason that the said plaintiff has no interest in the subject-matter thereof and does not own the mortgage sought to be foreclosed in this action; the defendants therefore ask that said suit be stricken from the docket of the court. This motion is based upon the affidavit of Charles M. Parker, hereto attached and made a part hereof.

JNO. P. MAULE,
Solicitor for Defendants Parker.

Affidavit.

In the Circuit Court of the United States for the District of Nebraska.

LUCINDA ORMSBY, Complainant, *vs.* CHARLES M. PARKER, EMMA PARKER, and MARTHA I. COURTNEY, Defendants. } In Chancery.

Charles M. Parker, being first duly sworn, on his oath says that he is the defendant named in the above action; that the note and mortgage sued on in this action were given to Walter J. Lamb as a part of the purchase price of lot three, in block ten, in Lavender's Addition to the city of Lincoln, which lot was sold and conveyed to affiant by the Lancaster County Bank, of which bank said Walter J. Lamb is the president and owner; that said bank gave to this affiant a warranty deed for said property; that he continued, as per agreement in notes herein sued on, to pay interest on said notes until September, 1886, at which time, the title having failed to said property, affiant declined to pay any further installments of interest on said notes; that during all of the time he had been 14 paying interest on said notes; the interest was paid to and received by said Walter J. Lamb, and that interest coupons were always delivered to him, affiant, by said Walter J. Lamb. Affiant further says that he never heard or knew or was informed that said notes and mortgage was or had been assigned to any person until after the failure of title to said property and suit for foreclosure was threatened.

Affiant further says that the alleged plaintiff, Lucinda Ormsby, is a sister of the said Walter J. Lamb, has no interest in the subject-matter of this suit, and is not the owner of said notes and mortgage, but any transfer or assignment of said note and mortgage that may have been made were made and suit brought in her name for the purpose of avoiding any defense on said notes and mortgage on account of failure of title to said property.

Affiant further says that assignment and transfer of said note and mortgage to said Lucinda Ormsby, if any was ever made, was without consideration, and was made solely for the reason above alleged, and to enable said Walter J. Lamb to bring suit on said note and mortgage in the Federal court, as he verily believes.

CHARLES M. PARKER.

Subscribed in my presence and sworn to before me this first day of February, A. D. 1890.

ELMER D. FRANK, *Clerk.*

Upon the back of said motion and affidavit appear endorsements in words and figures following, to wit: No. 250, N. Lucinda Ormsby *vs.* Charles M. Parker *et al.*, def'ts. Motion & aff. of Charles M. Parker. Filed Feb. 1, 1890. Elmer D. Frank, clerk. John P. Maule, att'y.

Thereupon, afterwards, to wit, on the 4th day of February, 1890, affidavit was filed in said case; which said affidavit is in words and figures following, to wit:

15 In the Circuit Court of the United States, District of Nebraska.

LUCINDA ORMSBY
vs.
CHARLES M. PARKER.

DISTRICT OF NEBRASKA, *ss:*

Walter J. Lamb, being first duly sworn, on oath says that Lucinda Ormsby is now and was at the commencement of this suit the absolute owner by indorsement of the note and mortgage in this suit, and that she paid for the same in money, the full value thereof, $2,000 in cash or over, and the transfer to her was an absolute sale, made in good faith, and the same was purchased by her as an investment, and that she had made and now hold- other like Nebraska loans or mortgages; that the supreme court of Nebraska has absolutely quieted the title of the said Charles M. Parker in and to the said lot 3 by its decree. Decree produced.

W. J. LAMB.

Subscribed in my presence & sworn to before me this 4th day of February, 1890.

ELMER D. FRANK, *Clerk.*

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 250, N. Lucinda Ormsby *vs.* Charles M. Parker *et al.* Affidavit. Filed Feb. 2, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the said January term of said court, on the 5th day of February, 1890, the following proceedings were had and done in said cause, as appears of record on folio 239, Journal "O," of said court, to wit:

LUCINDA L. ORMSBY
vs.
CHARLES M. PARKER *et al.*

It is ordered by the court that the affidavit and motion
16 filed herein be, and are hereby, stricken from the files in this case, and defendants are ruled to answer to the merits by the 10th instant.

Thereupon, afterwards, to wit, on the 10th day of February, 1890, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

LUCINDA L. ORMSBY
vs.
CHARLES M. PARKER, ELLA PARKER, & MARTHA I. COURTNEY. } Answer of Martha I. Courtney.

Comes now the defendant Martha I. Courtney and, for answer to plaintiff's bill herein filed, *and* denies each and every allegation therein contained except as hereinafter specifically admitted.

2. Defendant denies that the plaintiff*s*, Lucinda L. Ormsby, has any interest in or to the said lot 3, in block 10, Lavender's Addition to the city of Lincoln, Lancaster county, Nebraska, and this defendant says that she is informed & believes that said note and mortgage is the property of her brother, one Walter J. Lamb, and that the same was assigned to her for the purpose of bringing this suit in this court, and that said note and mortgage is the property & is owned by the said Walter J. Lamb.

3. Defendant alleges that she has a claim in the said property in question; that on the — day of —— she purchased said lot at sheriff's sale by reason of a judgment obtained *i*n November 3rd, 1873, against Luke Lavender in a suit wherein Henry Atkins was plaintiff and Luke Lavender was defendant; and defendant says that at the time of the sale said judgment was a lien against said lot 3, in block 10, Lavender's Addition to the city of Lincoln, Lancaster county, Nebraska, and by reason of said sheriff's sale a deed was issued to this defendant, which deed is hereto attached, marked Exhibit A, and made a part of this answer.

4. And defendant says that she has a further lien on the said lot in question by reason of a certain contract in writing for the
17 sum of $——, given to the said Luke Lavender by one C. S. Parmenter, one of the grantors of the said Charles M. Parker; which contract giving a lien to the said Lavender was *was* in the words and figures following.

5. Defendant expressly denies that the Lancaster County Bank was ever a corporation organized under the laws of the State of Nebraska or ever had any right to hold any real estate or to receive a deed from Cooper B. Parker for the said lot 3, or to make a deed for said lot to the said Charles M. Parker.

Wherefore the defendant asks that her liens may be declared against the said property, and that they be adjudicated as first liens upon the said lot 3, in block 10 aforesaid, and for costs.

O. P. MASON,
D. G. COURTNEY,
Att'ys for Defendant Courtney.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 250, N. Lucinda Ormsby *vs.* Charles M. Parker *et al.* Answer of Martha I. Courtney. Filed Feb. 10, 1890. Elmer D. Frank, clerk. O. P. Mason & D. G. Courtney, for Courtney.

Thereupon, afterwards, to wit, on the 12th day of February, 1890, replication was filed in said case; which said replication is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

LUCINDA ORMSBY
vs.
CHARLES M. PARKER *et al.*

The replication of Lucinda Ormsby, plaintiff, to the answer of Martha I. Courtney, defendant.

This repliant, saving and reserving unto herself, now and at all times hereafter, all and all manner of benefit and advantage 18 of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto say that *they* will aver, maintain, and prove her said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants *are* uncertain, untrue, and insufficient to be replied unto by the repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant *she* and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by her said bill of complaint she has already prayed.

WALTER J. LAMB,
Solicitor for Plaintiff.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 250, doc. N. U. S. circuit court, district of Nebraska. In equity. Lucinda Ormsby *vs.* Charles M. Parker *et al.* Replication. Filed Feb. 12, 1890. Elmer D. Frank, clerk. Walter J. Lamb, solicitor for plaintiff.

Thereupon, afterwards, to wit, at the April term of said court, on the 22d day of April, 1890, the following proceedings were had and done in said cause, as appears of record on folio 343, Journal "O," of said court, to wit:

LUCINDA L. ORMSBY
vs.
CHARLES M. PARKER *et al.* } Default.

On filing due proof of personal service of the subpœna issued in this cause on Charles M. Parker and Emma Parker, the defendants herein, twenty days before the return day thereof, and a rule day having elapsed since said return day, and said defendants 19 having failed to answer within the time limited and prescribed by the rules and practice of this court, on motion of Walter J. Lamb, solicitor for the complainants, it is ordered that the bill of complaint filed in this cause be, and the same is hereby, taken as confessed by said defendants.

Thereupon, afterwards, to wit, on the 30th day of April, 1890, exceptions to decree & affidavit *was* filed in said case; which exceptions are in words and figures following, to wit:

Exceptions to Any Decree Being Taken Herein.

United States Circuit Court for the District of Nebraska.

LUCINDA L. ORMSBY, Plaintiff,
vs.
CHARLES M. PARKER, EMMA PARKER, and
MARTHA I. COURTNEY, Defendants. } Exceptions to any Decree Being Taken Herein.

To the honorable judges of the circuit court of the United States of *Nebraska* for the district of Nebraska:

Comes now the said Charles and Emma Parker and except to the jurisdiction of this court and to any decree being entered herein, for the reason that the note sued on in this action and set forth in the bill was made, executed, and delivered to Walter J. Lamb, named in said bill, and the said Walter J. Lamb is the well-known attorney in this court and was and still is a citizen and resident of this State, and that the said note and mortgage was made, executed, and delivered to said Lamb within the State of Nebraska while he was a citizen of Nebraska, and it is an attempt on the part of said Lamb in this action to recover the contents of said promissory note and said mortgage in the name of said Lucinda L. Ormsby, who is a relative of said Lamb, without any allegation in her said bill that said Lucinda L. Ormsby is the assignee and the owner of said

promissory note and mortgage, and because no allegation of
20 *of* residence or citizenship of the original payee of said note,
Walter J. Lamb, is made to appear in said bill, and because
no jurisdiction is stated or shown upon the face of said bill or the record herein by the said Lucinda L. Ormsby, or is it made to appear in any way that this court has jurisdiction of the parties or subject-matters herein.

And these defendants pray the court here to set aside the default taken in this action on the 23rd day of April, 1889, for the reason that the clerk of the court informed these defendants that nothing could or would be done in this action until the May term, 1890, of this court; that such information was given to these defendants first by letter and afterwards by telephone from Omaha.

CHARLES & EMMA PARKER,
By L. C. BURR, *Their Attorney.*

Affidavit.

U. S. Circuit Court for the District of Nebraska.

LUCINDA L. ORMSBY, Plaintiff,
vs.
CHARLES M. PARKER, EMMA PARKER, and MARTHA I. COURTNEY, Defendants.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Charles M. Parker, being first duly sworn, on his oath says he is one of the respondents in this action, and that on the 7th day of September, 1886, at the city of Lincoln, in said county, he made, executed, and delivered to Walter J. Lamb his promissory note that is fully described in the bill in this action for the amount and at the rate of interest therein named; that Walter J. Lamb was at that time and still is at this time a resident of the city of Lincoln, Lancaster county, Nebraska, and a citizen of the State of Nebraska, and that said Lucinda L. Ormsby is a relative of the said Walter J.
Lamb and, as affiant believes, is his sister.

21 On the — day of M'ch, 1890, this affiant wrote a letter to
Elmer D. Frank, clerk of the United States circuit court,
from Lincoln, where affiant resides, asking him when this court would meet. Hereto attached and made a part of this affidavit is the letter that he received from said clerk in answer thereto. Affiant further, on or about the 1 day of April, 1890, *he* telephoned to said court at Omaha and asked said clerk when said court would convene, so that this affiant might be present and show to said court that said bill in this action did not state facts sufficient to give jurisdiction to this court, and said clerk replied to him by telephone that said court would not convene until the month of May, 1890; and further affiant saith not.

CHARLES M. PARKER.

Subscribed in my presence and sworn to before me this 30th day of April, 1890.

[SEAL.] L. C. BURR,
Notary Public.

Upon the back of said exception & affidavit appear endorsements in words *ad* and figures following, to wit: No. 250, N. U. S. circuit court for district of Nebraska. Lucinda L. Ormsby, plaintiff, *vs.* Charles M. Parker *et al.*, def'ts. Exceptions to decree & affidavit. Filed Apr. 30, 1890. Elmer D. Frank, clerk. L. C. Burr, attorney for defendant.

Thereupon, afterwards, to wit, on the 1st day of July, 1890, notes, coupons, and mortgage were filed in said case; which said notes, coupons, & mortgage are in words and figures following, to wit:

Note.

$2,000.00. LINCOLN, NEBRASKA, *Sept. 7th*, 1886.

On the seventh day of September, 1891, I promise to pay Walter J. Lamb or order two thousand & no $\frac{}{100}$ dollars, with interest from date at the rate of eight per cent. per annum, payable semi-annually, as per coupons hereto attached, value received, principal and interest payable at the Lancaster County Bank, in Lincoln, Nebraska.

22 Should any of said interest coupons not be paid when due it shall bear interest at the rate of eight per cent. per annum from the time the same becomes due, and upon failure to pay any of said interest within thirty days after due the holder may elect to consider the whole note due and collectible at once; and in case the note or any of the coupons attached to the same shall not be paid when due and it shall be placed in the hands of an attorney-at-law for collection, or in case an action is brought for the collection of the same, I agree to pay a sum equal to ten per cent. of the amount due thereon as attorney's fees.

No. 3115. C. M. PARKER.

Coupons.

$80. MARCH 7TH, 1889.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two thousand dollars, payable at the Lancaster County Bank, in Lincoln, Nebraska.

No. 5. C. M. PARKER. No. 3782.

$80. SEPTEMBER 7TH, 1889.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two thousand dollars, payable at the Lancaster County Bank, in Lincoln, Nebraska.

No. 6. C. M. PARKER. No. 4079.

$80. March 7th, 1890.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two thousand dollars, payable at the Lancaster County Bank, in Lincoln, Nebraska.

No. 7. C. M. PARKER. No. 4188.

$80. September 7th, 1890.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two
23 thousand dollars, payable at the Lancaster County Bank, in
Lincoln, Nebraska.

No. 8. C. M. PARKER.

$80. March 7th, 1891.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two thousand dollars, payable at the Lancaster County Bank, in Lincoln, Nebraska.

No. 9. C. M. PARKER.

$80. September 7th, 1891.

I promise to pay Walter J. Lamb or order eighty & no $\frac{}{100}$ dollars, being semi-annual interest to that date on 1 note for two thousand dollars, payable at the Lancaster County Bank, in Lincoln, Nebraska.

No. 10. C. M. PARKER.

Upon the back of said note & coupon appear endorsements in words and figures following, to wit: Pay L. L. Ormsby or order. Lancaster County Bank, Lincoln, Neb. F. O. Metcalf, cashier. No. 250, N. Pay Lancaster County Bank or order. I waive demand, notice, protest, and notice of protest and guarantee the payment of the within note. W. J. Lamb. Cancelled by order of court and filed Jul- 1, 1890. Elmer D. Frank, clerk.

Mortgage.

This indenture, made and entered into this seventh day of September, one thousand eight hundred and eighty-six, between Chas. M. Parker and Emma Parker, his wife, both of Lincoln, Nebraska, of the first part, and Walter J. Lamb, of the same place, of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of two thousand dollars to them duly paid, have sold, and by these presents do grant and convey, to the said party of the second part and to his heirs, executors, and administrators and
assigns all that certain lot, parcel, or piece of land situated in
24 the city of Lincoln, in the county of Lancaster and State of
Nebraska, and more particularly known and described as
follows, to wit: The west half of lot No. two and all of lot No. three,

in block No. ten, in Lavender's Addition to said Lincoln, more particularly described as follows: Beginning on the south line of L street 75 feet west of the northeast corner of said block ten, Lavender's Addition, running thence west along L street 75 feet; thence south, parallel with 18th street, 142 feet to the alley running east & west; thence east, parallel with L street, 75 feet; thence north, parallel with 18th street, 142 feet to the place of beginning, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, and interest of the said party of the first part therein, including all rights arising by virtue of the laws of the State of Nebraska pertaining to exemption of homesteads, which right is expressly waived; and said mortgagors do hereby covenant with said mortgagee, his heirs and assigns, that he is lawfully seized of said premises; that they are free from encumbrances, and *and* the said mortgagors do hereby covenant to warrant and defend the same premises against the lawful claims of all persons whomsoever.

And the said Emma Parker, wife of the said Chas. M. Parker, hereby releases all her right of dower in the foregoing-described premises. Said mortgagors agree to continually keep $1,000 insurance in some good and reliable insurance company on all buildings on said premises and written in policy, loss if any, payable to said mortgagee as his interest may appear:

Provided always, and these presents are upon this condition: That whereas said Chas. M. Parker has executed and delivered to said mortgagee 1 promissory note of even date herewith, drawing 8 per cent. interest per annum, payable semi-annually from date, and due in five years from the date hereof, for the sum of two thousand dollars:

25 If the said mortgagors, their administrators, executors, or assigns, shall well and truly pay or cause to be paid said sum of money in said note mentioned, with the interest thereon, according to the tenor and effect of said note, and shall duly keep and perform all covenants and agreements herein contained on their part to be kept and performed, then these presents shall be null and void; and it is hereby agreed that on default of said mortgagor to pay the taxes or insurance as herein provided, then the said mortgagee or assigns may pay the same; which sum so paid, with 10 per cent. interest, shall be a lien on said premises like the principal sum, and all over-due indebtedness hereon of every kind shall draw 8 per cent. interest per annum; but if said sum of money or any part thereof or any interest thereon is not paid when due, or if the taxes and assessment against said premises are not paid at or before the same becomes delinquent, or if said mortgagee fails to keep any other covenants or agreements as herein provided, then the whole of said sum and interest shall immediately become due and payable.

In testimony whereof the parties of the first part have hereunto set their hands and seals the day and year first aforesaid.

C. M. PARKER. [SEAL.]
EMMA PARKER. [SEAL.]

In presence of—
A. A. CUMMINGS.

THE STATE OF NEBRASKA, } *ss:*
Lancaster County,

On this seventh day of September, 1886, before me, A. A. Cummings, a notary public duly commissioned, qualified for, and residing in said county, personally came the above-named Chas. M. Parker and Emma Parker, his wife, who are also personally known to me to be the identical persons described in and whose
26 names are affixed to the foregoing instrument as mortgagors, and they severally acknowledged the said instrument to be their voluntary act and deed for the purposes therein stated.

Witness my hand and seal, at Lincoln, on the date last above mentioned.

[SEAL.] A. A. CUMMINGS,
Notary Public.

Upon the back of said mortgage appear endorsements in words and figures following, to wit: No. 250, N. The State of Nebraska, Lancaster county, *ss:* Entered on numerical index and filed for record in the clerk's office of said county the 7th day of September, 1886, at 3 o'clock and 10 minutes p. m., and recorded in Book 12 of M't'g-, at page 604. O. C. Bell, county clerk, by E. H. Zerricke, dep. 1.25 p'd. Real-estate mortgage—long form—from Chas. M. Parker & wife to Walter J. Lamb. Canceled by order of court and filed Jul- 1, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 1st day of July, 1890, the following proceedings were had and done in said cause, as appears of record on folio 656, Journal "O," of said court, to wit:

LUCINDA ORMSBY
vs.
CHARLES M. PARKER, EMMA PARKER, MARTHA I. COURTNEY. } Decree. 250, N.

This cause came on to be heard and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

On reading and filing the complainant's proofs and *pro confesso* decree, which bears date the — day of ——, 1890, the court finds the allegations of the complainant's bill of complaint to be true, and finds there is due unto the complainant on her note and
27 coupons and mortgage from the defendant, Charles M. Parker, the sum of two thousand two hundred ninety-one & $\frac{80}{100}$ dollars as of this date, besides an attorney's fee of $229.00; and on motion of Walter J. Lamb, counsel for the complainant, — is ordered, adjudged, and decreed, and this court doth order, adjudge, and decree, that the said findings stand ratified and confirmed; and it is further ordered, adjudged, and decreed the said Charles M. Parker pay or cause to be paid to complainant the amounts so found due as aforesaid, together with interest from date at 8 per cent. and costs,

including 229 dollars as attorney's fees, to be taxed as costs, on or before the first day of August, 1890, and in default thereof that all and singular the mortgaged premises mentioned in the bill of complaint in this cause and hereinafter described, or so much thereof as may be sufficient to raise the amount due, twenty-five hundred twenty & $\frac{80}{100}$ dollars, for the principal, interest, and costs in this case, and which may be sold separately without material injury to the parties interested, to be sold at public auction, by or under the direction of F. C. Shafer, special master in chancery, at any time after the said first day of August, 1890, provided that the request for a stay of sale, as provided by the statutes of Nebraska, is not made within that time; that the said sale be made at the west door of the post office & court-house, in the city of Lincoln, State of Nebraska; that the said special master give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant or any of the parties in this cause may become the purchaser; that the said special master execute a deed or deeds to the purchaser or purchasers of the said mortgaged premises on the said sale, and that said special master out of the proceeds of said sale pay the costs thereof and costs of this suit, and pay said complainant or her solicitor the amount so found due as aforesaid, together with interest thereon at the rate of eight per cent. per
28 annum from date hereof, or so much thereof as the purchase-
money of the mortgaged premises will pay of the same, and that the said special master take receipt for the amount so paid and file the same with the clerk of this court, and that he bring the surplus moneys arising from said sale, if any there be, into court without delay to abide the further order of this court; and it is further ordered, adjudged, and decreed that the defendant and all persons claiming or to claim from or under any of the defendants be forever barred and foreclosed of and from equity of redemption and claim of, in, and to said mortgaged premises and every part and parcel thereof.

And it is further ordered that purchaser or purchasers of said mortgaged premises at such sale be put in possession thereof, and any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the special master's deed for such premises and a certified copy of the order confirming the report of such sale after such order has become absolute; and it is further ordered and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainant, with interest and costs and expenses of sale as aforesaid, that said special master specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the complainant shall be at liberty to apply to the court for an order that the defendant, Charles M. Parker, who is personally liable for the debt secured by said mortgage*m*, pay to the complainant the amount of such deficiency, with interest thereon from date of such report, and that the complainant have execution therefor. The description and particular boundaries of the 29 property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage and from the complaint in this cause, are as follows, viz: The west half of lot two (2) and all of lot three (3), in block No. ten (10), in Lavender's Addition to said Lincoln, in Lancaster county, State of Nebraska, more particularly described as follows: Beginning on the south line of L street 75 feet west of the northeast corner of said block ten (10), Lavender's Addition, running thence west along "L" street 75 feet; thence south, parallel with 18th street, 142 feet to the alley; thence east, parallel with L street, 75 feet; thence north, parallel with 18th, to place of beginning.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 10th day of July, 1890, request for stay of order of sale was filed in said case; which said request is in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the United States — Court in and for the District of Nebraska.

LUCINDA ORMSBY, Plaintiff,
vs.
CHARLES M. PARKER *et al.*, Defendants.

Comes now the defendants, Charles M. Parker and Emma A. Parker, and ask that stay of order of sale be entered in the above case for the period of nine months, as per statute in such cases made and provided.

Witness our hands this 9th day of July, A. D. 1890.

C. M. PARKER.
EMMA A. PARKER,
By C. M. PARKER, *Att'y.*

Upon the back of said request appear endorsements in words and figures following, to wit: No. 250, N. Lucinda Ormsby *vs.* C. M. Parker *et al.* Request for stay of order of sale. Filed Jul- 10, 1890. Elmer D. Frank, clerk.

30 Thereupon, afterwards, to wit, on the 27th day of October, 1890, prayer for exception and appeal was filed in said case; which said prayer for exception & appeal is in words and figures following, to wit:

In the Circuit Court, District of Nebraska.

ORMSBY
vs. 250, N.
PARKER *et al.*

Comes now the said Parker & Parker and prays the court here, on this 27th day of October, 1890, at the same term of court that the decree herein was rendered, to give to them all exception to the overruling of the motion and exception to the decree filed by said Parker in this action, and the said respondents pray an appeal be allow- them herein; and they will ever pray.

L. C. BURR,
Solicitor for Parkers.

Upon the back of said prayer for exception, &c., appear endorsements in words and figures following, to wit: No. 250, N. Ormsby *vs.* Parker. Prayer for exception and appeal. Filed Oct. 27, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the January term of said court, on the 19th day of February, 1891, the following proceedings were had and done, as appears of record on Journal "P" of said court, to wit:

LUCINDA L. ORMSBY
vs.
CHARLES M. PARKER *et al.* } 250, N.

Order Granting Appeal and Fixing Bond.

Now, on this 19th day of February, 1891, comes the respondents Charles M. Parker and Emma Parker, by L. C. Burr, their 31 solicitor, and in open court prays an appeal to the Supreme Court of the United States from the decree made and entered herein on the first day of July, 1890, and upon consideration thereof it is ordered that said appeal be granted, and the same is hereby allowed, and the appeal bond of said respondents is fixed at the sum of $300.00.

Thereupon, afterwards, to wit, on the 20th day of February, 1891, bond for an appeal was filed in said case; which said bond is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

LUCINDA L. ORMSBY, Complainant,
vs.
CHARLES M. PARKER, EMMA PARKER, and MARTHA I. COURTNEY, Respondents. } Bond for Appeal.

Know all men by these presents that we, Charles M. Parker and Emma Parker, as principal-, and J. H. McMurtry, as sureties, are held and firmly bound unto Lucinda L. Ormsby in the full and just sum of three hundred dollars ($300.00), to be paid to the said Lucinda L. Ormsby, her attorney, executor, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of February, in the year of our Lord eighteen hundred and ninety-one.

Whereas lately, at a circuit court of the United States held within and for the district of Nebraska, in a suit pending in said court between said Lucinda L. Ormsby, complainant, and the said Charles P. Parker and Emma Parker and Martha I. Courtney, respondents; and the said Charles M. Parker and Emma Parker having obtained an appeal therefrom and filed a copy thereof in the clerk's office of said court to reverse the said decree in the aforesaid suit, and
32 a citation directed to the said Lucinda L. Ormsby, citing and admonishing her to be and appear *and* a Supreme Court of the United States to be holden in Washington, *at* the District of Columbia, on the 2nd day of October next:

Now, the condition of the above obligation is such that if the said Charles M. Parker and Emma Parker shall prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, then the obligation to be void; else to remain in full force and virtue.

CHARLES M. PARKER.
EMMA PARKER.
J. H. McMURTRY.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 250, N. U. S. circuit court, district of Nebraska. Lucinda L. Ormsby, plaintiff, *vs.* Charles M. Parker *et al.*, defendants. Bond for an appeal. 20 Feb'y, 1891, the within bond approved. Elmer S. Dundy, judge. Filed Feb. 20, 1891. E. D. Frank, clerk.

Thereupon, afterwards, to wit, on the 26th day of February, 1891, a citation was duly issued in said case and returned and filed March 3rd, 1891; — which citation the following is the original:

33 THE UNITED STATES OF AMERICA, *District of Nebraska*, } *ss:*

To Lucinda L. Ormsby, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 28th day of March next, pursuant to an appeal allowed and filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Charles M. Parker and Emma Parker are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 26th day of February, 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 28th day of February, 1891, I received this citation, and on the 2nd day of March, 1891, I served the same upon the within-named appellee, upon Walter J. Lamb, att'y for said appellee, in Lancaster county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By A. G. HASTINGS,
Deputy United States Marshal.

Service	2 00
Copy	30
Mileage	12
Marshal's costs	$2 42

Paid by L. C. Burr, att'y for appellants.

[Endorsed :] Filed Mar. 3, 1891. Elmer D. Frank, clerk.

[Endorsed :] No. 250, N. United States circuit court, district of Nebraska. Lucinda L. Ormsby *vs.* Charles M. Parker *et al.* Citation. Filed Mar. 3, 1891. Elmer D. Frank, clerk.

34 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that the foregoing folios, from one to 34, contain true and faithful transcripts of all the pleadings and proceedings in the case of Lucinda L. Ormsby, plaintiff, *vs.* Charles M. Parker *et al.*, defendants, of record and on file in my office as such clerk and the whole thereof and the endorsements thereon, and that a copy of said citation has been lodged and remains in my office.

Seal United States Circuit Court,
District of Nebraska.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 4th day of March, A. D. 1891.

ELMER D. FRANK, *Clerk.*

35 In the Supreme Court of the United States.

CHARLES M. PARKER and EMMA PARKER, Appellants, *v.* LUCINDA L. ORMSBY, Appellee. } Assignment of Errors.

Come now the said appellants, Charles M. and Emma Parker, by their attorney, L. C. Burr, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in overruling the exceptions to any decree

being taken in this action because no allegation was made in said bill of the residence or citizenship of the original payee of said note, Walter J. Lamb, and because no jurisdiction is stated or shown upon the face of said bill or record herein by the said Lucinda L. Ormsby, nor is it made to appear in any way that the circuit court had jurisdiction of the parties or subject-matter herein.

2. The court erred in holding that it had jurisdiction of the subject-matter or parties to this action.

3. The court erred in rendering any decree herein for the reason that the court had no jurisdiction, as shown by the face of said bill and upon the face of the record herein.

The said Charles M. and Emma Parker pray that the decree of the circuit court of the United States for the district of Nebraska may be reversed, annulled, and alltogether held for nought, and that they may be restored to all things which they have lost by reason of said decree.

L. C. BURR,
Att'y for Appellants.

[Endorsed:] U. S. circuit court, district of Nebraska. Charles & Emma Parker, appellants, *v.* Lucinda L. Ormsby, appelle-. Assignment of errors. ——— ———, attorneys for appellants.

Endorsed on cover: Nebraska C. C. U. S. No. 1658. Charles M. Parker and Emma Parker, appellants, *vs.* Lucinda L. Ormsby. Filed March 17, 1891.

Office Supreme Court U. S.
FILED.
APR 18 1891
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

MOTION TO ALLOW APPELLANTS TO FILE SUPERSEDEAS BOND OR TO DISMISS THE ACTION.

LIONEL C. BURR,
Solicitor for Appellants.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

Motion to allow appellants to file supersedeas bond or to dismiss the action.

Come now the said Charles M. and Emma Parker and move the court here for an order *nunc pro tunc*, permitting the appellants to file a supersedeas bond, for the reason that none was allowed by the honorable circuit court within the usual time, and because none was allowed when said circuit court did allow an appeal herein, and for the further reason that no injustice will be done to appellee. The instruments she brought her action upon draw ten per cent interest per annum with ample security not including any bond the court may require.

Samuel Peugh vs. Henry S. Davis, 110 U. S., p. 227.

For the further reason that it clearly appears on the face of the record herein that the circuit court had no jurisdiction over the parties or subject matter in this action, and that a sale of said property by the appellee would result in great loss and injury to both parties to this action. To dismiss said action of appellee for the reason that the circuit court had no jurisdiction.

LIONEL C. BURR,
Counsel for Appellants.

ARGUMENT.

A question of jurisdiction under the act of 1887 and 1888 arises in the record to the bill filed by the appellee in the circuit court in this action. The promissory note and mortgage, on which the appellee sought to recover a decree, are in the usual form of such instruments——the note is made payable to the person named therein, to-wit, Walter J. Lamb, or order—and the mortgage was given to him to secure the payment of the note; each of them was dated at Lincoln, Nebraska, and the note was made payable at Lincoln, Nebraska. The name of the payee of the note appears on the face of the bill as Walter J. Lamb, but there is no allegation in the bill as to his citizenship or residence, either at the time the note and mortgage were given or at the time the bill was filed in the circuit court, and the only question raised here is whether this action could be maintained in the circuit court without alleging in the bill or showing in the record the citizenship and residence of the payee of the note, Walter J. Lamb. The meaning of that clause of the first section of the act of 1887, which relates to suits by assignees of promissory notes and other choses in action, seems to be well discussed in the case of Newgass vs. The City of New Orleans, wherein the court, speaking of the manner the act of 1887 was passed, says when it came from the house of representatives the clause referred to was as follows:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of bills of exchange." 18 Cong. Rec., 646.

The senate amendment was probably intended to retain jurisdiction over a large class of securities made by corporations, railroad companies, and the like, which are sold in open market and negotiable by delivery. Certainly it was not intended to give jurisdiction in all actions by assignees on promissory notes and other contracts excepting those last mentioned. If we turn to the Cong. Rec., Vol. 18, number 65, page 2721, we find that this section of this bill which had come from the house of representatives was amended in the senate by inserting the following:

"Except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been [redacted] in such court to recover the said contents if no assignment or transfer had been made."

The court further says in the case above referred to, that those rights of actions which require an assignment were excluded from the jurisdiction unless the assignor could have prosecuted an action to have recovered on his promissory note before he made his assignment. Those choses in action which did not require any express assignment, because they were payable to bearer and thus passed by delivery, were also excluded from the jurisdiction, unless made by some corporation, if the transferee could not have maintained a suit thereon before transfer. The construction of the restriction may also be stated thus: "The circuit court shall have no jurisdiction over suits for the recovery of the contents of a promissory note or other choses in action brought in favor of assignees or transferees except over, first, suits upon foreign bills of exchange, second, suits that may have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made, third, suits of choses in action payable to bearer and made by corporations."

Newgass vs. City of New Orleans, 33 Fed. Rep., p. 196.

This case was cited and approved by Judge Hallett in two cases; they came before him in the Rollins vs. Chaffee County in 34 Federal Reporter, page 91, in which he says: "Accordingly I am constrained to follow the interpretation placed upon the act, in the New Orleans case cited above, and hold jurisdiction of actions by assignees, when the assignor was not competent to sue in this court, only in cases of foreign bills of exchange and negotiable securities payable to bearer, and made by a corporation."

Judge Shiras had occasion to consider the same part of this jurisdiction act in Hudson et al. vs. Bishop, 38 Federal Reporter, page 681, in which he approves of the construction here placed upon this part of the act in the two former cases cited above. See also Rosenbaum vs. Council Bluffs, 37 Federal reporter, page 271.

The supreme court of the United States was called upon to discuss the same principle as claimed herein in the case of Schoecraft vs. Blockham, where the court held that even under the jurisdiction act of 1875 this action could not have been maintained, in which Mr. Justice Field says that the terms used in that act—"the contents of any promissory note or other choses in action"—were designed to embrace the rights the instrument conferred, which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court.

Shoecraft vs. Blockham, 124 U. S., p. 735.
Corbin vs. County of Blackhalk, 105 U. S., p. 659.

The bill filed in the circuit court by appellee did not show upon its face, nor did the record in any manner show, jurisdiction in the circuit court. It did not show nor was there any allegation in the bill of who Walter J. Lamb was at the time the note was executed and delivered to him, nor where his residence and citizenship was, either at that time or when the bill was filed in the circuit court, and for this reason alone the bill should have been dismissed.

Stevens vs. Nichols, 130 U. S., p. 230.
Crehore vs. Ohio & Miss. R. R. Co., 131 U. S., p. 240.
Jackson vs. Allen, 132 U. S., p. 27.
La Confiance Compagnie Anonyme d'Assurance vs. Hale, 137 U. S., p. 61.

Under section 2 of the judiciary act of 1789 this court has held that the assignee of a note or bill is not entitled to maintain his action in the circuit court unless a suit might have been prosecuted in such court to recover the contents of the note or mortgage if no assignment had been made, and that the petition, bill, or record must show upon its face that the endorser, through whom the plaintiff claims, had the requisite citizenship to give jurisdiction to the circuit court at the time the note or mortgage was made, and that the circuit court having only limited jurisdiction, it must appear affirmatively on the face of the bill or record that the court had jurisdiction, and that, when an action upon a promissory note is brought in federal court by an endorser against the maker, not only the parties to the suit but also the citizenship of the payee and the endorser must be averred in the bill or record, and be shown to be such as to give the court jurisdiction, and the presumption is that said Lamb was a resident and citizen of Nebraska.

Morgan Executor vs. Gray, 19 Wallace, p. 81.

And Mr. Justice Fields, speaking for the whole court in the case of Ambler vs. Eppinger, 137 U. S., page 481, reaffirms the doctrine heretofore laid down by this court in the following decisive language:

"The construction given by the court in Neshler vs. Dodge, 16 How., 622, to the clause of the eleventh section of the judiciary act, which denied to any circuit court 'cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange,' is in harmony with the construction we give to the act of 1887. * * *"

Ambler vs. Eppinger, 137 U. S., p. 480.
Desler vs. Dodge, 16 How., p. 622.
Bushnell vs. Kennedy, 9 Wall., p. 381.

The appellants objected and excepted to any decree being signed by the honorable circuit court, and filed several affidavits showing the residence and citizenship of said Lamb, both at the time the note was made and when the action was brought. He was a resident and citizen of the state of Nebraska, and appellee did not deem it necessary to dispute this important fact.

The cases cited are decisive of the jurisdiction of the circuit court, and the supersedeas bond should be allowed if the action is not dismissed.

LIONEL C. BURR,
Solicitor for Appellants.

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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

ARGUMENT IN REPLY TO THE MOTION TO DISMISS THE APPEAL.

LIONEL C. BURR,
Solicitor for Appellants.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

Argument in reply to the motion to dismiss the appeal.

May it please the court:

The consent of parties cannot confer jurisdiction over them in a circuit court, and the objections to the jurisdiction of the court were made to appear in the record, and the court's attention was called to the fact that no jurisdiction appears on the face of the record. If jurisdiction appeared on the face of the record, then the application for a stay of order of sale would not make it appear of record that the citizenship of the parties to the instruments sued on, and the assignees thereof, was such that the federal courts could take jurisdiction thereof.

The record did not affirmatively show jurisdiction. This must appear on the part of complainant.

Stevens vs. Nichols, 130 U. S., p. 230.
Crehore vs. Ohio & Miss. R. R. Co. 131 U. S., p. 240.
Jackson vs. Allen, 132 U. S., p. 27.
La Confiance Compagnie Anonyme d'Assurance vs. Hale, 137 U. S., p. 61.

The argument set up in our brief for permission to file supersedeas bond is applicable, and is a sufficient answer to this motion of appellee, and we respectfully call the attention of the court to the same.

The action of appellee should be dismissed.

LIONEL C. BURR,
Solicitor for Appellants.

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JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

Motion to Dismiss the Appeal in this Action.

WALTER J. LAMB,
Counsel for Appellee.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

Motion to dismiss the appeal in this action.

Comes now Lucinda L. Ormsby and moves the court here to dismiss the appeal in this action for the following reasons:

First—Because no proceedings in error or appeal are allowed by law after the stay of the order of sale was taken in this action by the said Charles M. Parker.

Second—Because all proceedings in error or appeal are denied and forbidden in the said action by section 5 of the act to provide for the stay of the execution of orders of sale, enacted by the legislature of the state of Nebraska, approved February 23, 1875. Sec. 477*e*, Rev. Statutes, page 916.

WALTER J. LAMB,
Counsel for Appellee.

Stay taken see page 20 reco

ARGUMENT.

The following plain provisions of the statutes of Nebraska deny the defendants any right of appeal or error in this cause:

AN ACT TO PROVIDE FOR STAY OF EXECUTIONS AND ORDERS OF SALE.

Be it enacted by the Legislature of the State of Nebraska:

SECTION 1. Hereafter no stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months from and after the rendition of such judgment or decree.

SEC. 2. The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same; *Provided*, That if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof.

* * * * * * * *

SEC. 5. No proceedings in error or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment entered as herein contemplated against one who is surety in the stay of execution.

* * * * * * * *

Approved February 23, 1875.

Revised Statutes, Nebraska, Sec. 477*e*, page 916.

Such positive provision of the law is applicable to the defendants in the federal as well as in the state court.

Brine vs. Insurance Co., 96 U. S., 627.

The appeal should be dismissed.

WALTER J. LAMB,
Counsel for Appellee.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

BRIEF AND ARGUMENT IN REPLY TO THE MOTION AND BRIEF OF THE APPELLANTS FOR LEAVE TO FILE SUPERSEDEAS BOND OR TO DISMISS THE ACTION.

WALTER J. LAMB,
Counsel for Appellee.

LINCOLN PAPER HOUSE, LINCOLN, NEB.

IN THE

Supreme Court of the United States.

CHARLES M. PARKER AND
EMMA PARKER,
Appellants,
vs.
LUCINDA L. ORMSBY,
Appellee.

Brief and argument in reply to the motion and brief of the appellants for leave to file supersedeas bond or to dismiss the action.

First—We call attention to the fact that there is nothing in the bill of complaint (pages 1–4 of the record) that shows or from which it can be inferred that Walter J. Lamb, the payee of the note and mortgage deed, was, at the time the said note and mortgage were made, at the time the same were assigned to Lucinda L. Ormsby, or at the time of the commencement of the said suit, a citizen of the state of Nebraska

Second—It appears (page 8 of the record) that on the 21st day of January, 1890, Charles M. Parker and Emma Parker, being in default of an answer, the bill of complaint was taken as confessed by said defendants.

Third—It appears (8th page of the record) that on the

1st day of February following the defendants obtained leave of the court to answer the complainant's bill by the 10th of February.

Fourth—It appears (page 9 of the record) that on the 1st day of February following, instead of answering the bill, the said Charles M. Parker and Emma Parker submitted to the court a motion or objection to the jurisdiction of the court on the ground that the court did not have jurisdiction of the subject matter of the suit because the plaintiff had no interest in the subject matter thereof. On the 5th day of February the said motion and affidavits were stricken from the files, and the defendants were ruled to answer *to the merits* by the 10th inst.

Fifth—It appears (page 13 of the record) that the defendants, Charles M. Parker and Emma Parker, having failed to plead or answer their default, was entered and the complainant's bill taken as confessed against them.

Sixth—It appears (page 18, record) that not until July 1, 1890, was there any decree signed in said court, and that the defendants at no time in any legal or proper manner raised any objection to the jurisdiction of the circuit court, and the record does not show that the attention of the court was ever called to the affidavit and objection filed by defendants in the case, or that the court ever acted upon them. There is therefore before this court only the bill of complaint, the defendant's default, and the decree. So we contend that the points sought to be made by appellants do not arise on the record, the law applicable to this cause and record being:

Seventh—"**Matters in abatement and to the jurisdiction being preliminary in their nature must be taken advantage of by plea, etc.**"

Livingston vs. Story, 11 Peters, 352.
Sheppard vs. Graves, 14 How., 511.

Eighth—"**After the entry of a decree pro-confesso, and while it stands unrevoked, the defendant cannot set up anything in opposition to it, either below or in this court on appeal, except what appears on the face of the bill.**"

Thompson and others vs. Wooster, 114 U. S., 104.

A case in point with the one at bar is that of

Wescott and Comblos vs. Cole and Shelby, 4 McLean, 80.

Ninth—That where matter *dehors*, the record must appear or be shown to raise the question that no presumption exists or will be made to defeat the jurisdiction when the complainant is competent to sue, and we call the attention of the court to the case of

Manufacturing Co. vs. Bradly, 15 Otto, p. 181,

where this rule is established by this court.

WALTER J. LAMB,
Counsel for Appellee.